**YAM TUNKU DATO' SERI NADZARUDDIN IBNI TUANKU JAAFAR**

**v.**

**DATUK BANDAR KUALA LUMPUR & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[APPLICATION COURT NO: R1-25-108-2001]
27 JULY 2005

***ADMINISTRATIVE LAW:*** *Remedies - Certiorari - Application to quash decision of Local Authority - Whether first respondent required to give reasons for granting of planning permission to third party objector - Federal Territory (Planning) Act 1982, s. 22(5) - Whether function of court to adjudicate upon merits of decision of planning authority - Issue of legitimate expectation - Whether first respondent bound by statements by former Dato Bandar - Whether newspaper reports inadmissible as evidence - Whether previous development orders material consideration under s. 22(4)(b) of the Federal Territory (Planning) Act 1982 as they relate to planning history of land - Whether decision making process vitiated by illegality or procedural impropriety*

***ADMINISTRATIVE LAW:*** *Exercise of administrative powers - Local Authority - Planning permission for development - Whether first respondent required to give reasons for granting of planning permission to third party objector - Federal Territory (Planning) Act 1982, s. 22(5) - Whether function of court to adjudicate upon merits of decision of planning authority - Issue of legitimate expectation - Whether first respondent bound by statements by former Dato Bandar - Whether newspaper reports inadmissible as evidence - Whether previous development orders material consideration under s. 22(4)(b) of the Federal Territory (Planning) Act 1982 as they relate to planning history of land - Whether decision making process vitiated by illegality or procedural impropriety*

The second respondent, a developer and registered owner of Lot PT 1066, Jalan Batai, Bukit Damansara, Mukim Kuala Lumpur ('the said land') had submitted a master layout plan to the first respondent, a local authority vested with powers in respect of the approval of any application for planning permission in the city of Kuala Lumpur, for its proposed development of Lot 8342 of which the said land is part of. On 18 February 1972, the first respondent approved the said master layout plan and the second respondent completed the development of 298 units houses. The second respondent

obtained a planning permission on 14 March 1974 (first development order) under which the approved development of 252 units of flats on the said land was reduced to 245 units of flat. On 11 June 1977, the second respondent applied for an amendment of the first development order *viz* to reduce the density of Block C from 28 storeys with 104 units to 18 storeys with 64 units which was approved by the first respondent (second development order). Subsequently the second respondent on 12 February 1999 applied further to amend the first development order to develop the balance 181 units of flats as 2 blocks of 20 storey apartments with three storey underground car park consisting of 181 units of apartments. On 26 August 2000, the first respondent gave notice pursuant to r. 5 of the Planning (Development) Rules 1970 in the local papers inviting the registered owners of lands adjoining the said land to forward their objections.

The applicant herein, whose land was adjacent to the said land, raised various objections to the second respondent's application. After hearing the objections, the first respondent asked the second respondent to revise its development proposal. Based on the amended proposal submitted by the second respondent, the first respondent issued a planning permission for the development of 107 units of apartment on the said land *ie*, 96 units of apartments in a 20 storey block and 11 units of apartments in a 3 storey town house block (third development order). The applicant *via* this application challenged the decision of the first respondent in granting planning permission by issuing the third development order. The issues that arose were (1) whether first respondent owed a duty to give reasons for granting of the planning permission as per the third development order; (2) whether first respondent was bound by the representation made by the former Dato' Bandar which appeared in the New Straits Times on 17 May 1991 and the Malay Mail on 13 January 1993 where he was alleged to have stated that the approval of new project above five storeys had been frozen, amongst others, in Damansara area due to lack of infrastructure to support such developments; (3) whether the first respondent was entitled to refer to the previous development orders and (4) whether the decision making process of the first respondent in issuing the third development order was vitiated by any illegality.

**Held (dismissing the applicant's application):**

**[1]** Section 22(5) of the Federal Territory (Planning) Act 1982 ('FTP Act') only requires the first respondent to give reasons to the second respondent and such duty arises when the planning permission is granted with conditions or if it is refused. It does not place a duty on the first respondent to give reasons to the applicant who in this case was a third party objector. Further, it was not the function of the court to adjudicate

upon the merits of the decision of the planning authority. In matters of planning approval and whether planning approval should be granted or refused is a matter for the first respondent to decide. The first respondent with the materials and information that he has is in a position to decide or determine how the planning of Kuala Lumpur should take place. The court's duty was only to see that the matter in hand has been determined by the first respondent in accordance with the relevant laws. There was no breach on the part of the first respondent. (pp 48 g & 50 a-b)

**[2]** Based on the former Dato Bandar's statements in the local newspapers, where he allegedly stated that approval of new projects above five storeys had been frozen in Damansara area, the applicant submitted that it had given rise to legitimate expectation which must be taken into account by the first respondent when exercising his statutory duties. However, the evidence relied upon were newspaper cuttings. It is trite that newspaper reports are inadmissible as evidence *(Karpal Singh v. Sultan of Selangor)*. Secondly, even if there was such a policy it does not bind the first respondent. Policies are in their nature transient and are, unlike statute, not generally regarded as binding or giving rise to any legitimate expectation. The only qualification to this statement of principle is where the party claiming the benefit of the expectation is able to show that he took steps in reliance of the policy. In the present case there was no evidence that the applicant took any steps in reliance of the purported policy. In fact the applicant should have known of the existence of the master layout plan or ought to have known of the existence of the master layout plan which designated the said land for high density development. On the doctrine of proportionality raised by the applicant, the court found that it had no application in this case. The applicant had misapprehended the significance of the master layout plan that was approved by the first respondent. (pp 50 e, h & 51 c-d)

**[3]** The case *South Oxfordshire District Council v. Secretary of State For Environment and Anor* does not support the applicant's stand that the first respondent was not entitled to refer to the previous development orders. Instead, the case fortified the first respondent's stand that the two development orders are material consideration under s. 22(4)(b) of the FTP Act as they relate to the planning history of the land. (p 52 b-c)

**[4]** The decision making process of the first respondent in issuing the third development order is not vitiated by any illegality, irrationality or procedural impropriety. Clearly the first respondent had not acted *ultra vires* his powers and the decision made by the first respondent could not be categorized as so outrageous as to defy logic such that no reasonable

person would make it. Also there was no procedural impropriety on the part of the first respondent. The applicant was given the opportunity to state his objection in writing as well as at an oral hearing. His objections were considered and taken into account by the first respondent in granting the third development order. (p 52 f-g)

**Case(s) referred to:**
*Datuk Bandar Kuala Lumpur v. Zain Azhari Zainal Abidin [1997] 1 MLJ 17* ***(refd)***
*Karpal Singh v. Sultan of Selangor [1988] 1 MLJ 64* ***(refd)***
*Lian Sdn Bhd v. Dato Bandar Kuala Lumpur & Anor [1993] 3 MLJ 605* ***(refd)***
*Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC* ***(refd)***
*Narendra Kumar v. Union of India AIR [1989] SC 2138* ***(refd)***
*South Oxfordshire District Council v. Secretary of State For Environment and Anor [1981] 1 WLR 1092* ***(refd)***

**Legislation referred to:**
Federal Territory (Planning) Act 1982, s. 22(4)(b), (5)
Planning (Development) Rules 1970, r. 5(6)

*For the appellant - G Rajasingam (Jack Yow with him); M/s Shearn Delamore & Co*
*For the 1st respondent - B Thangaraj; M/s Thangaraj & Assoc*
*For the 2nd respondent - Steven Thiru; M/s Shook Lin & Bok*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Raus Sharif J:**
This is an application by the applicant for an order of *certiorari* to quash the decision of the first respondent of 11 September 2001 which gave the following approvals to the second respondent:

(a) approved the second respondent's application for an increase in the residential density of Lot PT No 1066, Jalan Batai, Bukit Damansara, Kuala Lumpur from 30 persons per acre to 285 persons per acre.

(b) Granted planning permission to the second respondent for the development of a block of 20 storey apartments (96 units) and one block of 3 and 3 1/2 storey town houses (11 units) with 3 podiums of car park on the said lot PT No 1066, Jalan Batai, Bukit Damansara, Mukim Kuala Lumpur.

The applicant is an individual and the registered proprietor of Lot PT 1239 HS(D) No 32441, Mukim Kuala Lumpur, Federal Territory, Kuala Lumpur.

The first respondent is a corporate sole established under Federal Territory Capital Act 1960, and is the local authority in charge of the city of Kuala Lumpur. The first respondent is vested with the powers in respect of the approval of any application for planning permission within the city of Kuala Lumpur.

The second respondent is a developer and the registered owner of Lot PT 1066, Jalan Batai, Bukit Damansara, Mukim Kuala Lumpur (the said land). The said land is part of Lot 8342 (which was previously known as Lots Nos: 4532, 4539 to 4542) Grant CT 27384, Section Jalan Batai/Jalan Batai Utara, Stage 5, Damansara Heights, Kuala Lumpur (Lot 8342).

Historically, on and about February 1972, the second respondent submitted a master layout plan to the first respondent for its proposed development of Lot 8342. The proposed development was for an area measuring 123.4 acres. On 18 February 1972, the first respondent approved the said master layout plan for the development of Lot 8342 as follows:

(a) Houses – 298 units

(b) Flats – 252 units

Total 550 units

Permissible density: 6 units per acre (30 persons per acre ie, 5 persons x 6 units).

Based on the permissible density of 6 units per acre, the permitted development of Lot 8342 was 740 units (ie. 123.4 acres x 6 units per acre).

The second respondent completed the development of the said 298 units houses. As to the development of the 252 units of flat on the said land, the second respondent obtained a planning permission on 14 March 1974 (1st Development Order). Under the 1st Development Order, the approved development of 252 units of flats on the said land was reduced to 245 units of flat. Nevertheless, the second respondent did not immediately proceed with the development of the flats. Only about three years later the development was reactivated where on 11 June 1977, the second respondent applied for an amendment of the 1st Development Order, *viz.* to reduce the density of Block C from 28 storeys with 104 units to 18 storeys with 64 units. The application was approved by the first respondent on 27 August 1977 (2nd Development Order).

The construction of Block C pursuant to the 2nd Development Order was completed in 1979 and the certificate of fitness was issued by the first respondent on 17 October 1979. Subsequently, the second respondent on 12 February 1999 applied further to amend the 1st Development Order to develop the balance 181 units of flats as 2 blocks of 20 storey apartments with 3 storey underground car park consisting of 181 units of apartments.

On 26 August 2000, the first respondent gave notice in pursuant to r. 5 of the Planning (Development) Rules 1970 in the New Straits Times and the Utusan Malaysia inviting the registered owners of lands adjoining the said land to forward their objections to the second respondent's application, if any, and to have the same addressed to the Pengarah Jabatan Perancang & Kawalan Bangunan of the first respondent.

The applicant, whose land is adjacent to the said land, by a letter dated 8 September 2000, raised various objections to the second respondent's application. The grounds advanced by the applicant in opposition to the second respondent's application were as follows:

(i) The planning permission, if granted, would increase, the density from 30 persons per acre to 408 persons per acre which is an increase of 1360 %.

(ii) On the basis of 2 cars per apartment, there would be 362 more cars. This does not take into account visitors to the development. This would lead to traffic congestion in the surrounding area.

(iii) The area in question will not be able to support a high density development as the public utilities that are presently available to the area as water supply, electricity drainage, telephone and sewerage etc. are not adequate. The extra loading on those utilities would result in frequent interruption and cuts in the services to the residents of the area.

(iv) The proposed development is contrary to the other type of development that has been permitted in the Bukit Damansara area namely, low rise developments such as the Prima Damansara, Belair Apartment and Desa Damansara.

(v) Dewan Bandaraya Kuala Lumpur should commission independent consultants to study and report on the likely impact of the proposed high density development in the area. The residents should be permitted participation in such a study and a copy of the report should be made available to the residents.

(vi) There should have been a comprehensive traffic study undertaken for the whole of the Bukit Damansara area especially as the traffic on the roads in the Damansara area has increased considerably in recent times. The recent road building and the Sprint Highway that is taking place has made the traffic situation in Damansara area chaotic.

(vii) The proposed development will take a number of years to complete and it will of course result in foreign labour being used and it has been the experience of the applicant in respect of developments in the area such as the building of bungalows foreign labour have been responsible for break-ins and other criminal acts. It is therefore, feared that with the massive development of this nature and with the use of foreign labour, there would be massive break-ins and there would also be an increase in crime in that area. The security therefore, of the applicant would be put in jeopardy by the development.

(viii) The development would adversely affect the environment in that pollution and environmental degradation would increase.

(ix) The proposed development will decrease the market price of the property owned by the applicant.

(x) The office of the first respondent had previously assured that the approval of new projects above five storeys had been frozen, amongst others, in Damansara area due to the lack of infrastructure to support such developments in those areas.

On 8 November 2000 the Pengarah Jabatan Perancang and Kawalan Bangunan of the first respondent convened a meeting in pursuant to r. 5(6) of the Planning (Development) Rules 1970 for the purpose of hearing the objections of the land owners including the applicant. The applicant was represented by his solicitors at the hearing.

After hearing the objections, the first respondent did not approve the amendments sought by the second respondent. The second respondent was asked to revise its development proposal. The second respondent then submitted an amended proposal. Based on the amended proposal, the first respondent on 19 November 2000, issued a planning permission for the development of 107 units of apartment on the said land ie, 96 units of apartments in a 20 storeys block and 11 units of apartments in a 3 storeys town house block (3rd Development Order). The applicant *via* this application is challenging the decision of the first respondent in granting planning permission by issuing the 3rd Development Order.

The applicant in his affidavit in support of this application had set out a number of grounds in challenging the decision of the first respondent. However, at the hearing of the application, the learned counsel for the application was content to confine his submission on the grounds which I will discuss below.

Firstly, learned counsel submitted that the first respondent owes a duty and/or have an obligation to give reasons for granting of the planning permission as per the 3rd Development Order. According to learned counsel, the requirement to give reasons is provided by s. 22(5) of Federal Territory (Planning) Act 1982 (FTP Act) and reinforced by the decisions in *Datuk Bandar Kuala Lumpur v. Zain Azhari bin Zainal Abidin* [1997] 1 MLJ 17 (*Zain Azhari*'s case) and *Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama Serbaguna Sungai Gelegar dengan Tanggungan* [1999] 3 CLJ 65 (*MPPP*'s case).

Learned counsels for the first respondent and second respondent respectively, were united in their stand that there is no duty on the part of the first respondent to give reasons to the applicant in granting the 3rd Development Order to the second respondent. According to them the cases relied by the applicant must be distinguished.

I am in agreement with the respondents. To me, s. 22(5) of the FTP Act only requires the first respondent to give reasons to the second respondent and such duty arises when the planning permission is granted with conditions or if it is refused. The section reads as follows:

> 22(5) Upon the receipt of an application for planning permission the Commissioner shall within such time as may be prescribed either grant or refuse the application and when the application is granted subject to condition or refused, the Commissioner shall give his reasons in writing for his decision.

Clearly, the above section does not place a duty to the first respondent to give reasons to the applicant who in this case is a third party objector. The applicant placed great reliance on the *MPPP*'s case, but it should be noted that in that case the Federal Court was dealing with the duty to give reasons that was owned to the applicant land owner and not a third party objector like the applicant. Hence, the *MPPP*'s case do not assist the applicant.

I am also of the view that the *Zain Azahari*'s case is not helpful to the applicant's cause. In *Zain Azahari*'s case the Court of Appeal upheld the decision of the High Court in granting *certiorari* against the first respondent was because no evidence was available at the hearing to support the first respondent's decision in granting the planning permission. The Court of Appeal held that a public decision-maker whose exercise of discretion was questioned

must meet the challenge by adducing relevant and admissible evidence. In that case, the first respondent did not file any affidavit, nor has there any sufficient reason been advanced in the affidavit to justify the failure to do so. The situation is vastly different from our present case. In our present case the first respondent did provide the reasons in the affidavit filed in opposing the application. At para. 22 of the affidavit (encl. 26) the first respondent stated *inter alia* as follows:

22.1 pada setiap masa malah daripada tahun 1974 Tanah berkenaan telah mendapat kelulusan untuk perkembangan 28 tingkat di mana ia melibatkan kepadatan penduduk yang tinggi.

22.2 pihak pemohon yang telah menjadi pemilik berdaftar Tanah Pemohon pada 10hb Ogos 1994 semestinya mempunyai pengetahuan nyata atau konstruktif bahawa tanah berkenaan adalah untuk pembangunan yang melibatkan kepadatan penduduk yang tinggi.

22.3 responden pertama telah mengambilkira segala fakta berkaitan lebar jalan yang sedia ada, system perparitan, bekalan air, bekalan elektrik, telefon dan kemudahan sebelum kelulusan diberikan kepada responden kedua.

22.4 pembangunan yang dicadangkan di atas tanah berkenaan adalah daripada sejak 1972 dan 1974 berbanding dengan pembangunan di Prima Damansara, Belair Apartment dan Desa Damansara.

22.5 Responden pertama selaku suatu badan statutori hanya boleh bertindak mengikut peruntukan statut dan soal kononnya jaminan diberikan seperti di dalam perenggan 16(a) (XIVI) adalah tidak mengikat.

22.6 lebih-lebih lagi jaminan yang kononnya diberikan adalah berdasarkan petikan daripada surat khabar seperti yang dikepilkan di dalam Exhibit TAP 4 kepada affidavit sokongan pemohon dimana kesahihannya tidak dapat ditentukan.

22.7 lebih-lebih lagi pembangunan di atas tanah berkenaan adalah berdasarkan pembangunan yang telah diluluskan pada tahun 1972 dan 1974.

22.8 Segala bantahan-bantahan daripada kesemua empat puluh satu (41) pemilik berdaftar yang bersebelahan tanah berkenaan telah dipertimbangkan sebelum kelulusan kepada responden kedua seperti yang dipinda diluluskan.

Clearly in our present case, the the first respondent had filed its rebuttal affidavit containing the reasons for granting planning permission. Hence, *Zain Azahari*'s case has no application in our case. Similarly, for the same reasons the case of *Lian Sdn. Bhd. v. Dato' Bandar Kuala Lumpur & Anor*. [1993] 3 MLJ 605, relied upon by the applicant, is also not applicable. In both cases, the first respondent did not file a rebuttal affidavit containing the reasons for granting the planning permission.

It had been said before that in cases of this nature, it is not the function of the court to adjudicate upon the merits of the decision of the planning authority. To me, in matters of planning approval and whether planning approval should be granted or refused is a matter for the first respondent to decide. The first respondent with the materials and information that he has is in a position to decide or determine how the planning of Kuala Lumpur should take place. The court's duty is only to see that the matter in hand has been determined by the first respondent in accordance with the relevant laws. From the evidence I do not see any breaches on the part of the first respondent.

Another issue raised by the applicant is the issue of legitimate expectation. The trust of the applicant's submission is that the first respondent was bound by the representation made by the former Dato Bandar, Tan Sri Elyas Omar which appeared in the New Straits Times on 17 May 1991 and the Malay Mail on 13 January 1993, Tan Sri Elyas Omar was alleged to have stated that the approval of new project above five storeys had been frozen, amongst others, in Damansara area due to the lack of infrastructure to support such developments in those areas. Those assurances, according to the applicant, had given rise to legitimate expectation which must be taken into account by the first respondent when exercising his statutory duties. But, the evidence relied upon by the applicant are newspaper cuttings. It is trite that newspaper reports are inadmissible as evidence. Abdul Hamid CJ (Malaya) (as he then was) in *Karpal Singh v. Sultan of Selangor* [1988] 1 MLJ 64 made the following observation with regards to newspaper reports:

> Before I consider the grounds, I would, in passing, observe that the sole foundation of the Originating Summons is the statement allegedly made by the Sultan as reported in the New Straits Times and The Star newspapers on July 27, 1987. There is no affidavit before the Court affirmed to by the reporter concerned stating that he heard the Sultan made such statement. The press reports of what the Sultan is reported to have said would appear to be inadmissible as hearsay. The fact that the Sultan has not contradicted the press reports does not, in my view, make the slightest difference for it is well-established that inadmissible evidence does not become admissible by reason of a failure to object.

Secondly, even if there was such a policy it does not bind the first respondent. Policies are in their nature transient and are, unlike statute not generally regarded as binding or giving rise to any legitimate expectation. The only qualification to this statement of principle is where the party claiming the benefit of the expectation is able to show that he took steps in reliance of the policy. This was stated by the Indian Supreme Court in *Narendra Kumar v. Union of India* AIR [1989] SC 2138:

A statement of policy is not a prescription of policy is not a binding criterion. In this connection, reference may made to the observations of *Sagnata Investment Ltd v. Norwich Corporation* [1971] 2 QB 614 at page 626. Also the observation in *British Oxygen Co. v. Board of Trade* [1971] AC 610. See also *Foulkes' Administrative Law* 6th Edition, at pages 181-184. In *Ex P Khan* (1981 - 1 All E.E. page 40), the Court held that a circular of self-made rule can become enforceable on the application of persons if it was shown that it had created legitimate expectation in their minds that the authority would abide by such a policy/guideline. However, the doctrine of legitimate expectation applies only when a person had been given reason to believe that the statute will abide by certain policy or guideline on the basis of which such applicant might have been led to take certain actions.

In the present case there is no evidence whatsoever that the applicant took any steps in reliance of the purported policy. In fact, the applicant should have known of the existence of the master layout plan or ought to have known of the existence of the master layout plan which designated the said land for high density development.

On the doctrine of proportionality raised by the applicant, I find that it has no application in this case. I am of the view that the applicant completely misapprehends the significance of the master layout plan that was approved by the first respondent on 18 February 1972. In this regard it must be noted that:

(i) The master layout plan demarcates the development of Lot 8342, which is a master title for 123.4 acres for the purpose of two types of development namely houses (298 units) and flats (252 units).

(ii) The development of the 252 units of flats was to be on the part of 8342 (measuring 2.94 acres) which was later subdivided and known an Lot No 1066 (the said land).

(iii) Pursuant to the master layout plan, the said land had always been earmarked for high-density development. The first respondent has issued three development orders in respect of the said land between 1974 to 2001. Under all the development orders, the second respondent was bound by the approval given under the master layout plan, which imposed a limit of 252 units of flat for the said land. As it were, only 64 units has been developed thus far in 1999 and if the 3rd Development Order is sustained a further 107 units will developed and thus the total development then stand 171 units only.

(iv) The density under the master layout plan was 4.46 unit per acre. If the development under the 3rd Development Order were to be considered, the density would only be 3.8 units per acre. This is still below the approved density of 6 units per acre.

It was submitted by the applicant that the first respondent was not entitled to refer to the previous development orders as the earlier development orders had lapsed. The applicant relied on the *South Oxfordshire District Council v. Secretary of State For Environment and Anor* [1981] 1 WLR 1092. I am of the view the said case does not support the applicant's stand. Instead, the case fortifies the first respondent's stand that the two development orders are material consideration under s. 22(4)(b) of the FTP Act as they relate to the planning history of the land. This may culled from the head notes of the case which reads as follows:

> ... although a planning authority was not bound by a planning permission which had expired, a premium grant of planning permission was part of the planning history of the site and could be taken into account when considering an application for planning permission, but the weight to be attached to it depended on the circumstances ...

This is not the situation in our case. The first respondent in the affidavit filed in opposing the application has stated the matters which was taken into account in approving the 3rd Development Order.

In conclusion, I am of the view that the decision-making process of the first respondent in issuing the 3rd Development Order is not vitiated by any illegality, irrationality or procedural impropriety. Clearly, the first respondent has not acted *ultra vires* his powers and the decision made by the first respondent cannot be categorized as so outrageous as to defy logic such that no sensible person would make it. Also there is no procedural impropriety on the part of the first respondent. The applicant was given the opportunity to state his objection in writing as well as at an oral hearing. In fact, his objections were considered and taken into account by the first respondent in granting the 3rd Development Order.

For the above-said reasons, the applicant's application is dismissed with costs.